STATE *of* CALIFORNIA
COMMISSION ON STATE MANDATES

January 11, 2017

Ms. Melanie Chaney
Liebert Cassidy Whitmore
6033 West Century Blvd, Suite 500
Los Angeles, CA 90045

Mr. Justyn Howard
Department of Finance
915 L Street
Sacramento, CA 95814

And Parties, Interested Parties, and Interested Persons (See Mailing List)

Re: **Proposed Decision**
Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Sections 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

Dear Ms. Chaney and Mr. Howard:

The Proposed Decision for the above-named matter is enclosed for your review.

Hearing

This matter is set for hearing on **Friday, January 27, 2017**, at 10:00 a.m., State Capitol, Room 447, Sacramento, California. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1187.9(b) of the Commission's regulations.

Special Accommodations

For any special accommodations such as a sign language interpreter, an assistive listening device, materials in an alternative format, or any other accommodations, please contact the Commission Office at least five to seven *working* days prior to the meeting.

Sincerely,

Heather Halsey
Executive Director

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Hearing Date: January 27, 2017
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ITEM 4

TEST CLAIM

PROPOSED DECISION

Government Code Sections 3505.4, 3505.5, and 3505.7

Statutes 2011, Chapter 680 (AB 646)

Local Agency Employee Organizations: Impasse Procedures

15-TC-01

City of Glendora, Claimant

EXECUTIVE SUMMARY

Overview

This Test Claim alleges reimbursable state-mandated activities arising from the amendment of the Meyers-Milias-Brown Act (MMBA) by Statutes 2011, chapter 680 (AB 646). Staff recommends that the Commission on State Mandates (Commission) find that the test claim statute (which is the only law pled by the City of Glendora (claimant)) did not legally compel the claimant to engage in a collective bargaining procedure known as factfinding. In addition, staff recommends that the Commission find no evidence in the record that the claimant was, as a practical matter, compelled to engage in factfinding. Therefore, staff recommends that the Commission find that the test claim statute does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution. On these grounds, staff recommends that the Commission deny the Test Claim.

Procedural History

On October 9, 2011, the Governor signed AB 646, which the Secretary of State chaptered as Statutes 2011, chapter 680. The effective date of the test claim statute was January 1, 2012.

The claimant alleged that it first incurred costs under the test claim statute on June 16, 2015.[1] On June 2, 2016, the claimant filed the Test Claim with the Commission. On July 25, 2016, the Department of Finance (Finance) filed comments on the Test Claim.[2] On August 24, 2016, Nichols Consulting filed comments on the Test Claim.[3] On September 16, 2016, the claimant

[1] Exhibit A, Test Claim, page 8.

[2] Exhibit B, Department of Finance's Comments on the Test Claim.

[3] Exhibit C, Nichols Consulting's Comments on the Test Claim. Nichols Consulting is an "interested person" under the Commission's regulations, defined as "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (California Code of Regulations, title 2, section 1181.2(j).)

filed rebuttal comments.[4] On November 16, 2016, Commission staff issued the Draft Proposed Decision.[5] On December 7, 2016, the claimant filed its comments on the Draft Proposed Decision.[6] Finance did not file comments on the Draft Proposed Decision.

Commission Responsibilities

Under article XIII B, section 6 of the California Constitution, local agencies and school districts are entitled to reimbursement for the costs of state-mandated new programs or higher levels of service. In order for local government to be eligible for reimbursement, one or more similarly situated local agencies or school districts must file a test claim with the Commission. "Test claim" means the first claim filed with the Commission alleging that a particular statute or executive order imposes costs mandated by the state. Test claims function similarly to class actions and all members of the class have the opportunity to participate in the test claim process and all are bound by the final decision of the Commission for purposes of that test claim.

The Commission is the quasi-judicial body vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6. In making its decisions, the Commission must strictly construe XIII B, section 6 of the California Constitution and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[7]

Claims

The following chart provides a brief summary of the claims and issues raised and staff's recommendation:

Subject	Description	Staff Recommendation
Over which statutes does the Commission have jurisdiction?	Claimant's Test Claim contains at least 11 references (many substantive) to Statutes 2011, chapter 680 (AB 646) and that is the only statute included in box 4 of the test claim form, which requires the claimant to "identify all code sections (include statutes, chapters, and bill numbers) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54	*Only Statutes 2011, chapter 680 (AB 646)* was pled in this Test Claim and that is the only statute over which the Commission has jurisdiction — The Commission is a tribunal of limited jurisdiction, and a claimant must specifically plead a statute or executive order in order to invoke the Commission's jurisdiction.

[4] Exhibit D, Claimant's Rebuttal Comments.

[5] Exhibit F, Draft Proposed Decision.

[6] Exhibit G, Claimant's Comments on the Draft Proposed Decision.

[7] *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1264, 1281, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

	[AB 290]). . .that impose the alleged mandate." The Test Claim filing contains no substantive references to Statutes 2012, chapter 314 (AB 1606).	
Was the claimant legally compelled by the test claim statute to engage in mediation or factfinding?	The test claim statute provides that, if a mediator is unable to resolve the controversy within 30 days after appointment, the employee organization may request submission to factfinding. However, mediation is voluntary under the statutory scheme.	*Deny* — Under the Meyers-Milias-Brown Act, mediation is voluntary. If factfinding is required at all, it is a downstream requirement of a local agency's discretionary decision to engage in mediation and therefore not a state-mandated activity.
Was the claimant legally compelled by the test claim statute to hold a public hearing?	The test claim statute provides that, upon an impasse, a local agency may implement its last, best, and final offer after holding a public hearing.	The test claim statute's requirement of a public hearing before the implementation of a last, best, and final offer does not legally compel local agencies to hold a public hearing, since the implementation of the last, best, and final offer is a discretionary decision of the local agency and the hearing is therefore a downstream requirement of that discretionary decision.
Was the claimant practically compelled to engage in mediation or factfinding or to hold a public hearing?	There is no argument in the test claim narrative, and no evidence in the record, that claimant was practically compelled to engage in mediation or factfinding or to hold a public hearing.	*Deny* — There is no evidence in the record that the claimant was practically compelled to engage in mediation or factfinding or to hold a public hearing.

Staff Analysis

The Meyers-Milias-Brown Act governs the collective bargaining rights and procedures of employees of local agencies.[8] The primary issue in this case is whether the test claim statute imposes a state-mandated program of mandatory factfinding upon local agencies governed by the Meyers-Milias-Brown Act. "Factfinding"[9] under California labor law is a process in which a panel of three members reviews evidence relevant to a dispute (e.g., the salaries of similar employees in other jurisdictions) and submits a non-binding recommendation of what the employer and the union should agree to.

1. The Commission Only Has Jurisdiction Over Statutes 2011, Chapter 680 Because That Is the Only Statute or Executive Order Which the Claimant Pled.

Staff finds that the claimant pled only Statutes 2011, chapter 680 in its Test Claim.

The Commission is a tribunal of limited jurisdiction, and a claimant must specifically plead a test claim statute or executive order in order to invoke the Commission's jurisdiction. In its Test Claim, the claimant makes at least 11 references (mostly substantive) to Statutes 2011, chapter 680, but by happenstance includes, as an exhibit, the current Government Code provision, without regard or reference to which statute may have amended it and makes no references to executive orders or regulations.

Since the claimant pled Statutes 2011, chapter 680 in its Test Claim — but did not plead Statutes 2012, chapter 314 (AB 1606) or any other law — this analysis and Decision are limited to Statutes 2011, chapter 680 (AB 646).

2. The Test Claim Statute, by Its Plain Language, Does Not Legally Compel Local Agencies to Engage in Mediation or Factfinding.

In this case, the test claim statute does not legally compel local agencies to act. The plain language of the test claim statute provides that, if a mediator is unable to resolve the controversy within 30 days after appointment, the employee organization may request submission to factfinding. However, mediation is voluntary under the plain language of the statutory scheme. Government Code section 3505.4 as replaced by the test claim statute reads in relevant part:

> If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.

This is the only sentence in the test claim statute which addresses how factfinding would commence. The remainder of the code sections amended by the test claim statute address the procedures for factfinding. Under the plain language of the Meyers-Milias-Brown Act as it existed prior to the enactment of the test claim statute, mediation was voluntary. Government Code section 3505.2, which was not amended by the test claim statute, has read as follows since 1968:

> If after a reasonable period of time, representatives of the public agency and the

[8] Government Code sections 3500 to 3511, inclusive.

[9] This term is variously spelled factfinding, fact-finding and fact finding. This Decision will utilize the term "factfinding", following the test claim statute, except for in direct quotations.

> recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

The plain language of Section 3505.2 — the parties "may agree" to appoint a "mutually agreeable" mediator — means that mediation under the Meyers-Milias-Brown Act is voluntary.[10]

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[11] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[12] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[13]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to the enactment of the test claim statute) did not contain or require an impasse procedure other than voluntary mediation, nor did the test claim statute add any language making such procedures mandatory. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure."[14] Moreover, the California Supreme Court has found that "… the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to *fact-finding* or binding arbitration."[15]

Consequently, the test claim statute allows for factfinding only "[i]f the mediator is unable to effect settlement." Since mediation remained voluntary upon the effective date of the test claim statute, factfinding — which is commenced only after unsuccessful mediation — is also voluntary under the test claim statute.

Since entering into mediation is a discretionary decision of the local agency, any factfinding that is later required as a result of unsuccessful mediation is at most a downstream requirement of

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[10] "'Shall' is mandatory and 'may' is permissive." Government Code section 14.

[11] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[12] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[13] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[14] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[15] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25, emphasis added.

that discretionary decision to mediate. Since the State of California is not obligated to reimburse a local agency for activities which are conducted voluntarily,[16] the test claim statute does not impose a reimbursable state mandate.

3. The Test Claim Statute's Requirement of a Public Hearing Before the Implementation of a Last, Best, and Final Offer Does Not Legally Compel Local Agencies to Hold a Public Hearing.

The test claim statute can be read to argue that, if a local government employer seeks to implement its last, best, and final offer, the local government employer is mandated to first hold a public hearing — even if the local government employer opted out of mediation and factfinding. Compare former Government Code section 3505.4 ("a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer") with the test claim statute's Government Code section 3505.7 ("a public agency that is not required to proceed to interest arbitration may, *after holding a public hearing regarding the impasse*, implement its last, best, and final offer") (new language emphasized).

While the test claim statute appears to create the new requirement of a public hearing regarding an impasse, the local government employer would only be obligated to hold the public hearing if the local government employer decided to impose its last, best, and final offer — and the imposition of the last, best, and final offer is a discretionary activity. The Public Employment Relations Board (PERB) has found, in *Operating Engineers Local 3 v. City of Clovis*, that "[p]ursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency 'may implement its last, best, and final offer.' This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer." [17] Under state mandates law, the voluntary actions of a local agency do not create a reimbursable state mandate. "[I]f a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[18]

The discretionary nature of the imposition of the last, best, and final offer renders the pre-requisite of a public hearing to be discretionary as well; the public hearing, therefore, is not a reimbursable state-mandate.

4. There Is No Evidence in the Record That Local Agencies Are Practically Compelled to Engage in Mediation or Factfinding or to Hold a Public Hearing.

The court in *Kern High School District*[19] — which involved the issue of which level of government was responsible for paying for mandatory activities which were part of voluntary

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[16] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727.

[17] Exhibit H, page 72 (*Operating Engineers Local 3 v. City of Clovis*, PERB Case No. SA-CE-513-M, page 5, footnote 5).

[18] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

[19] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727.

educational programs — left open the possibility that a state mandate might be found in circumstances of practical compulsion, where a local entity faced certain and severe penalties as a result of noncompliance with a program that is not legally compelled.

The claimant has not submitted any evidence that it was practically compelled to engage in factfinding. There is no evidence in the record that, for example, the claimant would have automatically suffered a reduction in state or federal funding if it refused to engage in factfinding. Rather, the record reveals that the claimant engaged in voluntary factfinding in or around August 2015, apparently under the mistaken belief that the test claim statute mandated factfinding.[20]

If a local agency employer and one of its unions reach an impasse, all that the test claim statute requires is that the local agency employer engage in factfinding if, as a pre-requisite, it previously agreed to voluntary mediation. Under the Section 3505.2, which was not amended by the test claim statute, a local agency employer who has reached impasse is free to decline mediation (which effectively declines factfinding). And, under the test claim statute, a local agency is then free to implement its last, best, and final offer.[21] Though it may be true that later enacted regulations and amendments to the Meyers-Milias-Brown Act have changed the voluntary nature of fact-finding, those later changes in law have not been pled and are not before the Commission.

Conclusion

Based on the foregoing discussion and analysis, staff finds that the test claim statute does not legally compel the local agencies to engage in mediation or factfinding or to hold a public hearing and there is no evidence in the record that the claimant or any other local agency was, as a practical matter, compelled to engage in mediation or factfinding, or to hold a public hearing. Therefore, the test claim statute does not impose a reimbursable state-mandated program.

Staff Recommendation

Staff recommends that the Commission adopt the Proposed Decision to deny this Test Claim and authorize staff to make any technical, non-substantive changes following the hearing.

[20] Exhibit D, Claimant's Rebuttal Comments, pages 11-16 (Fact-finding Report & Recommendations, City of Glendora and Glendora Municipal Employees Association, dated August 24, 2015, pages 1-6).

[21] Government Code section 3505.7, as added by Statutes 2011, chapter 680, section 4.

BEFORE THE

COMMISSION ON STATE MANDATES

STATE OF CALIFORNIA

IN RE TEST CLAIM ON: Government Code Sections 3505.4, 3505.5, and 3505.7; Statutes 2011, Chapter 680 (AB 646) Filed on June 2, 2016 By City of Glendora, Claimant	Case No.: 15-TC-01 *Local Agency Employee Organizations: Impasse Procedures* DECISION PURSUANT TO GOVERNMENT CODE SECTION 17500 ET SEQ.; CALIFORNIA CODE OF REGULATIONS, TITLE 2, DIVISION 2, CHAPTER 2.5, ARTICLE 7. (*Adopted January 27, 2017*)

DECISION

The Commission on State Mandates (Commission) heard and decided this Test Claim during a regularly scheduled hearing on January 27, 2017. [Witness list will be included in the adopted Decision.]

The law applicable to the Commission's determination of a reimbursable state-mandated program is article XIII B, section 6 of the California Constitution, Government Code sections 17500 et seq., and related case law.

The Commission [adopted/modified] the Proposed Decision to [approve/deny] the Test Claim by a vote of [vote count will be included in the adopted Decision], as follows:

Member	**Vote**
Ken Alex, Director of the Office of Planning and Research	
Richard Chivaro, Representative of the State Controller	
Mark Hariri, Representative of the State Treasurer, Vice Chairperson	
Sarah Olsen, Public Member	
Eraina Ortega, Representative of the Director of the Department of Finance, Chairperson	
Carmen Ramirez, City Council Member	
Don Saylor, County Supervisor	

Summary of the Findings

This Test Claim alleges reimbursable state-mandated activities arising from the enactment of amendments to the Meyers-Milias-Brown Act by Statutes 2011, chapter 680 (AB 646). For this Test Claim, the Commission's jurisdiction is limited to Statutes 2011, chapter 680, the only statute which the claimant specifically pled. The Commission finds that the test claim statute does not legally compel the City of Glendora (claimant) to engage in a collective bargaining procedure known as factfinding. In addition, the Commission finds no evidence in the record that the claimant or any other local agency was, as a practical matter, compelled to engage in factfinding. The test claim statute's requirement of a public hearing before the implementation of a last, best, and final offer does not legally compel local agencies to hold a public hearing, because the implementation of a last, best and final offer is a voluntary act. Therefore, the test claim statute does not impose a reimbursable state-mandated program on local agencies within the meaning of article XIII B, section 6 of the California Constitution. On these grounds, the Commission denies the Test Claim.

COMMISSION FINDINGS

I. Chronology

10/09/2011 The test claim statute, Statutes 2011, chapter 680, was enacted.

01/01/2012 Effective date of Statutes 2011, chapter 680.

06/16/2015 Claimant allegedly first incurred costs under Statutes 2011, chapter 680.[22]

06/02/2016 Claimant filed the Test Claim with Commission.[23]

07/25/2016 Department of Finance (Finance) filed comments on the Test Claim.[24]

08/24/2016 Nichols Consulting filed comments on the Test Claim.[25]

09/16/2016 Claimant filed rebuttal comments.[26]

11/16/2016 Commission staff issued the Draft Proposed Decision.[27]

12/07/2016 Claimant filed comments on the Draft Proposed Decision.[28]

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[22] Exhibit A, Test Claim, page 8.

[23] Exhibit A, Test Claim.

[24] Exhibit B, Department of Finance's Comments on Test Claim.

[25] Exhibit C, Nichols Consulting's Comments on the Test Claim. Nichols Consulting is an "interested person" under the Commission's regulations, defined as "any individual, local agency, school district, state agency, corporation, partnership, association, or other type of entity, having an interest in the activities of the Commission." (California Code of Regulations, title 2, section 1181.2(j).)

[26] Exhibit D, Claimant's Rebuttal Comments.

[27] Exhibit F, Draft Proposed Decision.

[28] Exhibit G, Claimant's Comments on the Draft Proposed Decision

II. Background

This Test Claim addresses Statutes 2011, chapter 680, which amended the Meyers-Milias-Brown Act to add a factfinding procedure after a local agency and a union reach an impasse in negotiations. The test claim statute went into effect on January 1, 2012.

A. Prior Law

1. The General Provisions of the Meyers-Milias-Brown Act

The collective bargaining rights of many local agency employees are governed by the Meyers-Milias-Brown Act, which is codified at Government Code sections 3500 to 3511. Specifically, the Meyers-Milias-Brown Act (also referred to herein as the "MMBA" or the "Act") applies to employees of California cities, counties, and certain types of special districts.[29]

The Meyers-Milias-Brown Act obligates each local agency to meet with the relevant "recognized employee organization" — the Act's term for a labor union — and to meet and confer in good faith regarding wages, hours, and other terms and conditions of employment.[30] The relevant provision of the Act, which was added in 1971 and has not been amended since, reads:

> The governing body of a public agency, or such boards, commissions, administrative officers or other representatives as may be properly designated by law or by such governing body, shall meet and confer in good faith regarding wages, hours, and other terms and conditions of employment with representatives of such recognized employee organizations, as defined in subdivision (b) of Section 3501, and shall consider fully such presentations as are made by the employee organization on behalf of its members prior to arriving at a determination of policy or course of action.
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> "Meet and confer in good faith" means that a public agency, or such representatives as it may designate, and representatives of recognized employee organizations, shall have the mutual obligation personally to meet and confer promptly upon request by either party and continue for a reasonable period of time in order to exchange freely information, opinions, and proposals, and to endeavor to reach agreement on matters within the scope of representation prior to the adoption by the public agency of its final budget for the ensuing year. The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or

[29] The Meyers-Milias-Brown Act applies to each "public employee," which is defined as any person employed by a "public agency." Government Code section 3501(d). A "public agency" is then defined as "every governmental subdivision, every district, every public and quasi-public corporation, every public agency and public service corporation and every town, city, county, city and county and municipal corporation, whether incorporated or not and whether chartered or not." Government Code section 3501(c).

[30] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

ordinance, or when such procedures are utilized by mutual consent.[31]

Meeting and conferring is intended to result in a tentative agreement which, if adopted, is formalized into a Memorandum of Understanding (MOU).[32] From 1969 to 2013, the relevant provision of the Act, which was not amended by the test claim statute, read:

> If agreement is reached by the representatives of the public agency and a recognized employee organization or recognized employee organizations, they shall jointly prepare a written memorandum of such understanding, which shall not be binding, and present it to the governing body or its statutory representative for determination.[33]

2. The Impasse Provisions of the Meyers-Milias-Brown Act Were Limited to Voluntary Mediation.

An "impasse" occurs when "despite the parties best efforts to achieve an agreement, neither party is willing to move from its respective position."[34]

The Meyers-Milias-Brown Act contains several provisions regarding what happens when an impasse in negotiations is reached.

As quoted above, the provision of the Act which requires a local agency and a union to meet and confer in good faith also counsels the negotiating parties to allocate time for a potential impasse. Government Code section 3505 reads in relevant part, "The process should include adequate time for the resolution of impasses where specific procedures for such resolution are contained in local rule, regulation, or ordinance, or when such procedures are utilized by mutual consent."

In addition, the Meyers-Milias-Brown Act recognizes the right of the negotiating parties to engage in voluntary mediation. Government Code section 3505.2 — which has not been amended since it was enacted in 1968 — reads:

> If after a reasonable period of time, representatives of the public agency and the

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[31] Government Code section 3505. See also Government Code section 3501(b) (definition of "recognized employee organization").

[32] Government Code section 3505.1.

[33] Government Code section 3505.1. The quoted language was in effect from 1969 to 2013. After the test claim statute was enacted, Statutes 2013, chapter 785, which was not pled and is not before the Commission, amended Government Code section 3505.1 to read:

> If a tentative agreement is reached by the authorized representatives of the public agency and a recognized employee organization or recognized employee organizations, the governing body shall vote to accept or reject the tentative agreement within 30 days of the date it is first considered at a duly noticed public meeting. A decision by the governing body to reject the tentative agreement shall not bar the filing of a charge of unfair practice for failure to meet and confer in good faith. If the governing body adopts the tentative agreement, the parties shall jointly prepare a written memorandum of understanding.

[34] *Vernon Fire Fighters v. City of Vernon* (1980) 107 Cal.App.3d 802, 827.

> recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[35] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[36] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[37]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to enactment of the test claim statute) did not contain an impasse procedure other than voluntary mediation. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure."[38] "Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration."[39]

B. The Test Claim Statute: Statutes 2011, Chapter 680

1. The Plain Language of the Test Claim Statute

The test claim statute, Statutes 2011, chapter 680, effective January 1, 2012, contains four provisions.

In Section One, the test claim statute repeals the pre-existing version of Government Code section 3505.4.[40] The pre-existing version of Government Code section 3505.4 read:

> If after meeting and conferring in good faith, an impasse has been reached between the public agency and the recognized employee organization, and impasse procedures, where applicable, have been exhausted, a public agency that

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[35] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[36] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[37] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[38] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[39] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

[40] Statutes 2011, chapter 680, section 1.

is not required to proceed to interest arbitration may implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.[41]

In Section Two, the test claim statute replaces Government Code Section 3505.4 to read:

3505.4. (a) If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel. Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

(b) Within five days after the board selects a chairperson of the factfinding panel, the parties may mutually agree upon a person to serve as chairperson in lieu of the person selected by the board.

(c) The panel shall, within 10 days after its appointment, meet with the parties or their representatives, either jointly or separately, and may make inquiries and investigations, hold hearings, and take any other steps it deems appropriate. For the purpose of the hearings, investigations, and inquiries, the panel shall have the power to issue subpoenas requiring the attendance and testimony of witnesses and the production of evidence. Any state agency, as defined in Section 11000, the California State University, or any political subdivision of the state, including any board of education, shall furnish the panel, upon its request, with all records, papers, and information in their possession relating to any matter under investigation by or in issue before the panel.

(d) In arriving at their findings and recommendations, the factfinders shall consider, weigh, and be guided by all the following criteria:

(1) State and federal laws that are applicable to the employer.

(2) Local rules, regulations, or ordinances.

(3) Stipulations of the parties.

(4) The interests and welfare of the public and the financial ability of the public agency.

(5) Comparison of the wages, hours, and conditions of employment of the employees involved in the factfinding proceeding with the wages, hours, and conditions of employment of other employees performing similar services in comparable public agencies.

[41] Statutes 2000, chapter 316, section 1.

(6) The consumer price index for goods and services, commonly known as the cost of living.

(7) The overall compensation presently received by the employees, including direct wage compensation, vacations, holidays, and other excused time, insurance and pensions, medical and hospitalization benefits, the continuity and stability of employment, and all other benefits received.

(8) Any other facts, not confined to those specified in paragraphs (1) to (7), inclusive, which are normally or traditionally taken into consideration in making the findings and recommendations.

In Section Three, the test claim statute adds to the Government Code a new Section 3505.5 which reads:

3505.5. (a) If the dispute is not settled within 30 days after the appointment of the factfinding panel, or, upon agreement by both parties within a longer period, the panel shall make findings of fact and recommend terms of settlement, which shall be advisory only. The factfinders shall submit, in writing, any findings of fact and recommended terms of settlement to the parties before they are made available to the public. The public agency shall make these findings and recommendations publicly available within 10 days after their receipt.

(b) The costs for the services of the panel chairperson selected by the board, including per diem fees, if any, and actual and necessary travel and subsistence expenses, shall be equally divided between the parties.

(c) The costs for the services of the panel chairperson agreed upon by the parties shall be equally divided between the parties, and shall include per diem fees, if any, and actual and necessary travel and subsistence expenses. The per diem fees shall not exceed the per diem fees stated on the chairperson's résumé on file with the board. The chairperson's bill showing the amount payable by the parties shall accompany his or her final report to the parties and the board. The chairperson may submit interim bills to the parties in the course of the proceedings, and copies of the interim bills shall also be sent to the board. The parties shall make payment directly to the chairperson.

(d) Any other mutually incurred costs shall be borne equally by the public agency and the employee organization. Any separately incurred costs for the panel member selected by each party shall be borne by that party.

(e) A charter city, charter county, or charter city and county with a charter that has a procedure that applies if an impasse has been reached between the public agency and a bargaining unit, and the procedure includes, at a minimum, a process for binding arbitration, is exempt from the requirements of this section and Section 3505.4 with regard to its negotiations with a bargaining unit to which the impasse procedure applies.

In Section Four, the test claim statute adds to the Government Code a new Section 3505.7 which reads:

3505.7. After any applicable mediation and factfinding procedures have been

exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5, a public agency that is not required to proceed to interest arbitration may, after holding a public hearing regarding the impasse, implement its last, best, and final offer, but shall not implement a memorandum of understanding. The unilateral implementation of a public agency's last, best, and final offer shall not deprive a recognized employee organization of the right each year to meet and confer on matters within the scope of representation, whether or not those matters are included in the unilateral implementation, prior to the adoption by the public agency of its annual budget, or as otherwise required by law.

2. The Legislative History of the Test Claim Statute

The legislative history of AB 646 — the bill which became the test claim statute — includes evidence that the author intended to insert a new factfinding procedure into the Meyers-Milias-Brown Act which would have been made mandatory by the inclusion of mandatory mediation provisions. However, the author removed the mandatory mediation provisions from the bill when it was heard by the Assembly Committee on Public Employees, Retirement and Social Security.

The Assembly Committee on Public Employees, Retirement and Social Security bill analysis on the test claim statute quotes the bill's author Assemblywoman Toni G. Atkins (D-San Diego), who recognized that the Meyers-Milias-Brown Act, in its then-current form, did not mandate factfinding or any other form of impasse procedure: "Currently, there is no requirement that public agency employers and employee organizations engage in impasse procedures where efforts to negotiate a collective bargaining agreement have failed," the Assemblywoman stated.[42]

However, although Assemblywoman Atkins argued in favor of the perceived benefits of *mandatory* impasse procedures stating that "[t]he creation of mandatory impasse procedures is likely to increase the effectiveness of the collective bargaining process, by enabling the parties to employ mediation and fact-finding in order to assist them in resolving differences that remain after negotiations have been unsuccessful,"[43] and "[f]act-finding panels can also help facilitate agreement, by making objective, factual determinations that can help the parties engage in productive discussions and reach reasonable decisions,"[44] opponents of AB 646 argued that "requiring mediation and factfinding prior to imposing a last, best and final offer would simply

[42] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

[43] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

[44] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 20 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 2).

add costs and be unhelpful to both the employer and the employees."[45]

The author agreed to a series of amendments, which the Committee memorialized as follows:

> 1) *Remove all of the provisions related to mediation*, making no changes to existing law.
>
> 2) *Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel* and instead provides employees organizations with the *option* to participate in the fact-finding process established in Government Section 3505.4 which is added by this measure.
>
> 3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.[46]

After the amendments were made, the Senate Floor Analysis stated that AB 646:

> 1. Allows an employee organization to request fact-finding when a mediator has been unsuccessful at effectuating a resolution to a labor dispute within 30 days of appointment. . . . .
> 3. Requires the fact-finding panel to meet with the parties within 10 days after appointment, and take other steps it deems appropriate. . . . .
> 5. Requires state and local public agencies, if requested by the panel, to furnish the panel with all records, papers and information in their possession relating to any matter under investigation by the panel. . . . .
> 7. Requires the fact-finding panel to make findings of fact and recommend terms of a settlement if the dispute is not settled within 30 days. . . . .
> 8. Requires the costs of the chairperson of the fact-finding panel to be paid for by both parties whether or not PERB selected the chairperson."[47]

3. Questions About the Language of the Test Claim Statute

Almost immediately after passage, the test claim statute was criticized on the grounds that, while the author's intent had been to make factfinding mandatory under the Meyers-Milias-Brown Act, the test claim statute as enacted merely made factfinding voluntary, not mandatory.

AB 646, as enacted, stated that mediation was a pre-requisite to factfinding. Since mediation under the Meyers-Milias-Brown Act is voluntary, and AB 646 as enacted did not include provisions to make it mandatory, this drafting rendered factfinding voluntary as well.

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[45] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3).

[46] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3, emphasis added).

[47] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 24-25 (Senate Rules Committee, Floor Analysis of AB 646, as amended on June 22, 2011, pages 2-3).

Specifically, the first sentence of newly added Section 3505.4 was drafted to read, "If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel."

Commentators and practitioners promptly criticized the language. Twelve days after the Governor signed AB 646, the employment law firm of Littler Mendelson P.C. posted the following analysis to its web site:

> It is questionable whether this new law actually fulfills the bill sponsor's apparent intent of requiring an employer to submit to factfinding before implementing its last, best and final offer in *all* cases where the union has requested factfinding. The bill sponsor's comments regarding AB 646 reference "the creation of *mandatory* impasse procedures," giving the impression of an intent to require these impasse procedures (e.g., factfinding and a public hearing) in all cases where a union requests them.
>
> However, the law, as written, arguably does not achieve this goal. AB 646 specifically states that "*[i]f the mediator is unable to effect settlement* of the controversy within 30 days after his or her appointment, the employee organization may request . . . factfinding . . . ." Because mediation is not required under the current version of the MMBA and, importantly, AB 646 did not change the voluntariness of mediation under the statute, it appears the union may not be able to insist on factfinding in the absence of a failed attempt at settling the dispute before a mediator. If true, it is possible that an employer can avoid the costs and delays associated with factfinding by declining to participate in mediation and, thereafter, implementing its last, best and final offer. Indeed, new Government Code section 3505.7, which was added by AB 646 and permits implementation of the last, best and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted," lends some support to this interpretation of the new law because it opens the door to the possibility that such procedures are permissive, but not necessarily required.[48]

Other commentators shared the concern. "[T]he statute's vague and inconsistent language leaves many questions unanswered as to how this new process will really work. . . . . We believe the legislative history clearly shows that AB 646 does not require mediation. However, without mediation, there is no clear trigger for fact-finding."[49] "Without mediation — voluntary or

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[48] Exhibit H, pages 2-3 (Edward Ellis and Jill Albrecht, "California Governor Signs New Collective Bargaining Law Requiring Factfinding Procedures for Impasse Resolution for Public Sector Employers Covered by the MMBA" dated October 21, 2011 [emphases in original], pages 2-3, http://www.littler.com/california-governor-signs-new-collective-bargaining-law-requiring-factfinding-procedures-impasse, accessed November 9, 2016).

[49] Exhibit H, pages 8, 15 (Renne Sloan Holtzman Sakai LP, Navigating the Mandatory Fact-Finding Process Under AB 646 [November 2011], pages 4, 11, http://www.pccfacultyassociation.org/wp-content/uploads/2012/09/fact_finding.pdf, accessed November 9, 2016).

mandatory — there is no explicit trigger for fact-finding, and opinions as to whether fact-finding is truly mandatory are already split."[50] "Can factfinding be avoided by not agreeing to mediation?"[51] "The question 'Is mediation required before the union can request factfinding?' may be the most obvious point of confusion created by the statute, but others exist."[52]

C. The Subsequent Adoption of Regulations and Statutes 2012, Chapter 314 (AB 1606)

After the enactment of the test claim statute, the Public Employment Relations Board (PERB) adopted emergency regulations and the Legislature enacted a subsequent statute in 2012 to address whether the factfinding process was required if the parties had not gone through mediation. The claimant did not plead the PERB regulations or the subsequent statute in its Test Claim, and, consequently, the Commission is not herein rendering a ruling upon these laws.[53] However, they are included in the Background for history and context.

1. PERB Regulation 32802

Within two months of the Governor's signing of AB 646, PERB, which has administered the Meyers-Milias-Brown Act since July 2001,[54] adopted emergency regulations.[55] PERB filed the emergency rulemaking package with the Office of Administrative Law (OAL) on

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[50] Exhibit H, page 26 (Emily Prescott, *Mandatory Fact-Finding Under the Meyers-Milias-Brown Act*, California Labor & Employment Law Review, Vol. 26 No. 1 [January 2012], page 2, http://www.publiclawgroup.com/wp-content/uploads/2012/01/Mandatory-Fact-Finding-Under-Meyers-Milias-Brown-Act-by-Emily-Prescott-Cal-Labor-and-Employment-Law-Review.pdf, accessed November 9, 2016).

[51] Exhibit H, page 35 (Best Best & Krieger LLP, *AB 646's Impact On Impasse Procedures Under the MMBA (Mandated Factfinding)*, dated December 2011, page 6, http://www.bbklaw.com/88E17A/assets/files/News/MMBA-Impasse%20Procedures%20After%20AB%20646.pdf, accessed November 9, 2016).

[52] Exhibit H, page 55 (Stefanie Kalmin, *A.B. 646 Raises Many Questions*, U.C. Berkeley Institute for Research on Labor and Employment, page 1, http://cper.berkeley.edu/journal/online/?p=952, accessed November 9, 2016).

[53] See Section IV.A. for detailed discussion.

[54] Government Code section 3509; see also Statutes 2000, chapter 901.

[55] The emergency regulations amended or added PERB Regulations 32380, 32603, 32604, 32802 and 32804. See Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 178-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5-8). In response to a Commission request, PERB provided 503 pages of underlying rulemaking documents. See Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, filed August 26, 2016.

December 19, 2011.[56] The emergency regulations became operative on January 1, 2012[57] — the same date that the test claim statute became effective. The emergency regulations became permanent after PERB transmitted a Certificate of Compliance to the OAL on or about June 22, 2012.[58]

One section of these emergency regulations — codified at California Code of Regulations, title 8, section 32802 (section 32802) — sought to implement, interpret, or make specific the provisions of the test claim statute.[59] Section 32802 of the emergency regulations read:

> 32802. Request for Factfinding Under the MMBA.
>
> (a) An exclusive representative may request that the parties' differences be submitted to a factfinding panel. The request shall be accompanied by a statement that the parties have been unable to effect a settlement. Such a request may be filed:
>
> > (1) Not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant either to the parties' agreement to mediate or a mediation process required by a public agency's local rules; or
> >
> > (2) If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.
>
> (b) A request for factfinding must be filed with the appropriate regional office; service and proof of service pursuant to Section 32140 are required.
>
> (c) Within five working days from the date the request is filed, the Board shall notify the parties whether the request satisfies the requirements of this Section. If the request does not satisfy the requirements of subsection (a)(1) or (2), above, no further action shall be taken by the Board. If the request is determined to be sufficient, the Board shall request that each party provide notification of the name and contact information of its panel member within five working days.
>
> (d) "Working days," for purposes of this Section and Section 32804, shall be those days when the offices of the Public Employment Relations Board are

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[56] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606, as introduced February 7, 2012, page 2). This analysis erroneously bears a "2011" date of hearing.

[57] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2011, No. 52.

[58] See History at the bottom of Code of California Regulations, title 8, section 32802. See also Register 2012, No. 31.

[59] Section 32804 was also amended by the emergency regulations and pertained to the test claim statute, specifically, the manner in which PERB would select the chairperson of the factfinding panel. Since Section 32804 is not relevant to the material issue of whether factfinding is mandatory under the test claim legislation, this Decision will not focus on Section 32804.

officially open for business.

(e) The determination as to whether a request is sufficient shall not be appealable to the Board itself.[60]

PERB Regulation 32802(a) begins by stating that "[a]n exclusive representative may request that the parties' differences be submitted to a factfinding panel" — a statement which is not qualified in terms of whether or not mediation has occurred.

Regulation 32802(a)(1) specifies a timeline for the initiation of factfinding after mediation, and Regulation 32802(a)(2) specifies a timeline for the initiation of factfinding when mediation has not occurred. Regulation 32802(a)(2) reads:

> If the dispute was not submitted to mediation, not later than 30 days following the date that either party provided the other with written notice of a declaration of impasse.

During the promulgation of this regulation, the question arose as to whether the test claim statute authorized PERB to oversee factfinding when no mediation had occurred since the test claim statute was silent on this point.

On November 8 and 10, 2011 — about one month after the Governor signed AB 646 — PERB staff members met in Oakland and Glendale with members of the public, including officials of unions representing city and county employees, regarding the draft regulations.[61] PERB also held formal meetings in its Sacramento headquarters about the regulations on December 8, 2011, and April 12, 2012.[62]

At these meetings, whether the test claim statute mandated factfinding in the absence of mediation was questioned.

During at least one of the non-Sacramento meetings, a union official "stated that at the PERB meeting he attended, the unions agreed that factfinding should be required even when mediation was not required by law."[63]

PERB member Dowdin Calvillo "commented on concerns expressed by some constituents with regard to staff's recommendation that factfinding would be required in situations where

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[60] Register 2011, No. 52. Subdivision (e) of Regulation 32802 was repealed as of October 1, 2013. (Register 2013, No. 34.)

[61] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 177-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 4-8).

[62] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 178-181 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, pages 5-8); Exhibit H, pages 62-63 (Minutes, Public Employment Relations Board Meeting, April 12, 2012, pages 6-7).

[63] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

mediation was not required by law."[64] Member Calvillo "said she was not sure if the Board had authority to require factfinding in those situations given that AB 646 was silent in that regard but that she was willing to allow the language to move forward as staff proposed and allow OAL to make that determination."[65]

According to PERB Minutes, Mr. Chisholm, the Division Chief of PERB's Office of General Counsel, "stated that AB 646 provides, for the first time, a mandatory impasse procedure under the MMBA."[66] Mr. Chisholm stated that AB 646 "established a mandatory factfinding procedure under the MMBA that did not exist previously."[67] "Mr. Chisholm acknowledged the comments and discussions held regarding whether factfinding may be requested where mediation has not occurred. PERB, having considered all aspects, including comments and discussions held, related statutes, and legislative history and intent, drafted a regulatory package that would provide certainty and predictability."[68]

During the period of time when the emergency regulations were being reviewed by OAL, the City of San Diego, as an interested person, submitted comments arguing that Regulation 32802(a) was inconsistent with the test claim statute and also lacked clarity. "PERB's proposed regulation 32802(a) is not consistent with A.B. 646, nor does it provide clarity to the public agencies subject to it," the City of San Diego wrote, through its City Attorney.[69] "A.B. 646 does not authorize or mandate factfinding when the parties do not engage in mediation of a dispute, nor does A.B. 646 mandate mediation."[70]

In response to the City of San Diego's letter, PERB agreed "that nothing in AB 646 changes the voluntary nature of mediation under the MMBA," but stated that "any attempt to read and

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[64] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[65] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 180 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 7).

[66] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 178 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 5).

[67] Exhibit H, page 62 (Minutes, Public Employment Relations Board Meeting, April 12, 2012, page 6).

[68] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 179 (Minutes, Public Employment Relations Board Meeting, December 8, 2011, page 6).

[69] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 120 (Letter from Joan F. Dawson, Deputy City Attorney, to Kathleen Eddy, Office of Administrative Law, and Les Chisholm, PERB, dated December 22, 2011, page 1).

[70] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 121 (Letter from Joan F. Dawson, Deputy City Attorney, to Kathleen Eddy, Office of Administrative Law, and Les Chisholm, PERB, dated December 22, 2011, page 2).

harmonize all of the statutory changes made by AB 646 must end in the conclusion that factfinding is mandatory . . . ."[71] PERB argued that its proposed emergency regulations were consistent with legislative intent and that the "majority of interested parties, both employer and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not."[72] PERB also argued that, since the test claim statute repealed the prior language regarding when an employer could implement its last, best, and final offer, the replacement language — which references factfinding — implies that factfinding must be a mandatory step in the process which leads to the ability of the employer to implement its last, best, and final offer.[73]

2. Statutes 2012, Chapter 314 (AB 1606) Amends Government Code Section 3505.4, Effective January 1, 2013.

Statutes 2012, chapter 314 (AB 1606), went into effect on January 1, 2013. According to the author of the bill, "Ambiguity in the drafting of AB 646 has called into question whether an employer can forgo all impasse procedures, including mediation and fact-finding. In fact, several government employers argue that AB 646 does not require fact-finding if the parties do not engage in mediation."[74]

Although PERB adopted Regulation 32802, "the issue whether AB 646 requires that mediation occur as a precondition to an employee organization's ability to request fact-finding remains unresolved," the author continued.[75] "AB 1606 would clarify that fact-finding is available to employee organizations in all situations, regardless of whether the employer and employee have

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[71] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 124 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 1).

[72] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

[73] "[I]t also is important to consider that AB 646 *repealed* the prior language of section 3505.4, which set forth the conditions under which an employer could implement its last, best and final offer (LBFO). In new section 3505.7, added by AB 646, the MMBA now provides that implementation of the employer's LBFO may occur only '[a]fter any applicable mediation and factfinding procedures have been exhausted, but no earlier than 10 days after the factfinders' written findings of fact and recommended terms of settlement have been submitted to the parties pursuant to Section 3505.5.' (Emphasis added.)" Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2).

[74] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 37 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 1).

[75] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

engaged in mediation."[76]

Unidentified supporters of AB 1606 were quoted as stating,

> During the PERB rulemaking process, it became apparent that AB 646 was drafted in a manner that called into question whether mediation was a precondition to an employee organization's ability to request factfinding. . . . . AB 1606 seeks to provide a final, statutory clarification of this question, by revising the Government Code to allow factfinding in all circumstances in which a local public employer and its employees have reached an impasse in their negotiations.[77]

According to the Senate Public Employment & Retirement Committee, AB 1606, ". . . . clarifies that if the dispute leading to impasse was not submitted to mediation, the employee organization may request factfinding within 30 days after the date that either party provided the other with written notice of the declaration of impasse."[78]

Statutes 2012, chapter 314 (AB 1606), contains two sections. Section One codifies the timelines and language contained in PERB Regulation 32802(a) and states that a union may demand factfinding whether or not mediation has occurred. Section One amends Government Code section 3505.4(a) to read (in underline and italic):

> 3505.4. (a) ~~If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the~~ *The* employee organization may request that the parties' differences be submitted to a factfinding panel~~.~~ *not sooner than 30 days, but not more than 45 days, following the appointment or selection of a mediator pursuant to the parties' agreement to mediate or a mediation process required by a public agency's local rules. If the dispute was not submitted to mediation, an employee organization may request that the parties' differences be submitted to a factfinding panel not later than 30 days following the date that either party provided the other with a written notice of a declaration of impasse.* Within five days after receipt of the written request, each party shall select a person to serve as its member of the factfinding panel. The Public Employment Relations Board shall, within five days after the selection of panel members by the parties, select a chairperson of the factfinding panel.

Section One also adds to Government Code section 3505.4 a new subdivision (e) which reads:

> (e) The procedural right of an employee organization to request a factfinding

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[76] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

[77] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 38 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 1606 as introduced on February 7, 2012, page 2).

[78] Exhibit H, page 65 (Senate Public Employment & Retirement Committee, Analysis of AB 1606 as introduced February, 7, 2012 [emphases omitted], page 2).

panel cannot be expressly or voluntarily waived.

Section Two makes a finding that the legislation is technical and clarifying, by stating:

> SEC. 2. The Legislature finds and declares that the amendments to Section 3505.4 of the Government Code made by this act are intended to be technical and clarifying of existing law.

III. Positions of the Parties and Interested Person

A. City of Glendora

The claimant argues that the following activities are mandated by the test claim statute and are reimbursable state mandates:

> If mediation did not result in settlement after 30 days and if the employee organization requests factfinding:
>
> 1) The agency must notice impasse hearing if delay in factfinding request.
> 2) Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of its member.
> 3) If chairperson is not approved by other party, agency must select a different chairperson.
> 4) PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.
> 5) The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)
> 6) The agency shall participate in all factfinding hearings.
> 7) The agency shall review and make the panel findings publicly available within 10 days of receipt.
> 8) The agency shall pay for half of the costs of the factfinding.
> 9) The agency must hold a public impasse hearing, if it chooses to impose its last, best offer.
> 10) The agency shall meet and confer with union and submit/resubmit last, best offer.
>
> One time costs would include:
>
> 1) Train staff on new requirements.
> 2) Revise local agency manuals, policies, and guidelines related to new factfinding requirements.[79]

[79] Exhibit A, Test Claim, page 7.

In response to Finance's comments on the Test Claim, the claimant filed written rebuttal comments.[80] In these rebuttal comments, the claimant took the position, without analysis, that the test claim statute established a mandatory factfinding procedure: "AB 646 changed the MMBA significantly by establishing new ***mandatory*** factfinding procedures, effective January 1, 2012."[81] The claimant also challenged the specific stances taken by Finance regarding what activities were newly imposed, or were discretionary.[82]

In comments on the Draft Proposed Decision, the claimant took the position that AB 646 imposed mandatory fact-finding and was therefore a reimbursable state mandate. In support of this outcome, the claimant made the following additional arguments:

- Instead of limiting this Test Claim to the statutes enacted by AB 646, the Commission should review the entire record, including the statutes enacted the following year by AB 1606.[83]
- The statutory language enacted by AB 646 is ambiguous, and, as such, legislative history and other indicia of intent — which indicate that the bill's author intended to impose mandatory fact-finding — should be reviewed and enforced by the Commission.[84]
- In the event that the language of AB 646 is not ambiguous, the Commission's literal interpretation yields an absurd result.[85]

B. Department of Finance

Finance asserts that the following activities identified in the Test Claim were required by prior law and, therefore, are not new programs or higher levels of service:

2) Agency must select a person to serve as its member of the factfinding panel, and pay for the costs of its member.

3) If chairperson is not approved by other party, agency must select a different chairperson.

5) The agency shall review and respond to all requests and subpoenas made by the panel and furnish panel with all relevant documents as requested. (This includes both administrative time to review and approve materials as well as clerical time to process these requests. Travel time would also be reimbursable if required.)

6) The agency shall participate in all factfinding hearings.[86]

Finance further alleges that activities 1, 9, and 10, identified in the Test Claim are discretionary

[80] Exhibit D, Claimant's Rebuttal Comments.

[81] Exhibit D, Claimant's Rebuttal Comments, page 2, emphasis in original.

[82] Exhibit D, Claimant's Rebuttal Comments, pages 2-7.

[83] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 7.

[84] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 8-14.

[85] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 14-15.

[86] See Exhibit B, Department of Finance's Comments on the Test Claim, page 1.

and are not mandated at all. These activities are:

1) The agency must notice impasse hearing if delay in factfinding request.

9) The agency must hold a public impasse hearing, if it chooses to impose its last, best offer.

10) The agency shall meet and confer with union and submit/resubmit last, best offer.[87]

Finally, Finance asserts alleged activities 4 and 8 (below) identified in the Test Claim are not a "program" as defined and are instead "straight costs," which are not subject to reimbursement:

4) PERB shall appoint a panel Chairperson and the agency shall pay for half of the panel chairperson's costs.

8) The agency shall pay for half of the costs of the factfinding.[88]

Finance's comments do not address one activity identified in the Test Claim: "7) The agency shall review and make the panel findings publicly available within 10 days of receipt."

Finance did not file comments on the Draft Proposed Decision.

C. Nichols Consulting

Nichols Consulting submitted written comments noting that: (1) the "prior laws" implicated by Finance's comments with regard to alleged activities 1, 9, and 10, are EERA (the Educational Employment Relations Act) and HEERA (Higher Education Employer-Employee Relations Act), both of which contain factfinding provisions that do not apply to cities, counties and other local agencies which are governed by the Meyers-Milias-Brown Act; and (2) the claimant does not appear to have requested the reimbursement of mediation costs, a subject on which the test claim statute is silent.[89]

IV. Discussion

Article XIII B, section 6 of the California Constitution provides in relevant part the following:

> Whenever the Legislature or any state agency mandates a new program or higher level of service on any local government, the state shall provide a subvention of funds to reimburse such local government for the costs of such programs or increased level of service…

The purpose of article XIII B, section 6 is to "preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that

[87] See Exhibit B, Department of Finance's Comments on the Test Claim, page 1.

[88] See Exhibit B, Department of Finance's Comments on the Test Claim, page 2.

[89] Exhibit C, Nichols Consulting's Comments on the Test Claim, pages 1-2.

articles XIII A and XIII B impose."[90] Thus, the subvention requirement of section 6 is "directed to state-mandated increases in the services provided by [local government] …"[91]

Reimbursement under article XIII B, section 6 is required when the following elements are met:

1. A state statute or executive order requires or "mandates" local agencies or school districts to perform an activity.[92]
2. The mandated activity either:
   a. Carries out the governmental function of providing a service to the public; or
   b. Imposes unique requirements on local agencies or school districts and does not apply generally to all residents and entities in the state.[93]
3. The mandated activity is new when compared with the legal requirements in effect immediately before the enactment of the test claim statute or executive order and it increases the level of service provided to the public.[94]
4. The mandated activity results in the local agency or school district incurring increased costs, within the meaning of section 17514. Increased costs, however, are not reimbursable if an exception identified in Government Code section 17556 applies to the activity.[95]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6 of the California Constitution.[96] The determination whether a statute or executive order imposes a reimbursable state-mandated program is a question of law.[97] In making its decisions, the Commission must strictly construe article XIII B, section 6 of the California Constitution, and not apply it as an

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[90] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

[91] *County of Los Angeles v. State of California* (*County of Los Angeles I*) (1987) 43 Cal.3d 46, 56.

[92] *San Diego Unified School Dist. v. Commission on State Mandates* (*San Diego Unified School Dist*.) (2004) 33 Cal.4th 859, 874.

[93] *Id*., pages 874-875 (reaffirming the test set out in *County of Los Angeles* (1987) 43 Cal.3d 46, 56).

[94] *San Diego Unified School Dist*. (2004) 33 Cal.4th 859, 874-875, 878; *Lucia Mar Unified School District v. Honig* (1988) 44 Cal.3d 830, 835.

[95] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (Cal. Ct. App. 1st Dist. 2000) 84 Cal.App.4th 1265, 1284; Government Code sections 17514 and 17556.

[96] *Kinlaw v. State of California* (1991) 53 Cal.3d 482, 487.

[97] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.

"equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[98]

A. The Commission's Jurisdiction Is Limited to Statutes 2011, Chapter 680, the Only Statute Which the Claimant Pled.

A threshold issue of this and every test claim is the identification of the statute or executive order which the Commission is to review. The claimant must identify at several points in the initial test claim filing which specific statute or executive order imposes, according to the claimant, a reimbursable state mandate.

The Draft Proposed Decision limited jurisdiction of this Test Claim to the Government Code sections that were enacted by Statutes 2011, chapter 680. In its comments on the Draft Proposed Decision, the claimant argues that the Commission should also analyze whether Statutes 2012, chapter 314 (AB 1606), the subsequent year's clean-up legislation, created a reimbursable state mandate.[99]

The Commission finds that the claimant pled only Statutes 2011, chapter 680 in this Test Claim. As detailed below, the Commission is a tribunal of limited jurisdiction, and a claimant must specifically plead a test claim statute or executive order in order to invoke the Commission's jurisdiction. Since the claimant pled Statutes 2011, chapter 680 — but did not plead Statutes 2012, chapter 314 or any other law in this Test Claim — the Commission's jurisdiction is limited to Statutes 2011, chapter 680.

1. A Claimant Is Obligated to Specifically Plead the Statute or Executive Order Which the Claimant Requests That the Commission Review.

Government Code section 17521 defines a "test claim" to mean the first claim filed with the Commission alleging a *particular statute or executive order* imposes costs mandated by the state…." (Emphasis added.)

Government Code section 17553, which governs the filing of test claims, specifically requires that:

- "All test claims shall be filed on a form prescribed by the commission and shall contain at least the following elements and documents: (1) A written narrative that identifies the specific sections of statutes or executive orders and the effective date and register number of regulations alleged to contain a mandate . . . ."[100], and
- "The written narrative shall be supported with copies of . . . The test claim statute that includes the bill number or executive order, alleged to impose or impact a mandate."[101]

The test claim form reads in relevant part:

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[98] *County of Sonoma v. Commission on State Mandates* 84 Cal.App.4th 1265, 1280 [citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817].

[99] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 6, 7.

[100] Government Code section 17553(b).

[101] Government Code section 17553(b)(3)(A)(i).

- In Section 4 of the test claim form, titled Test Claim Statutes Or Executive Orders Cited, the form states, "Please identify all code sections (*including statutes, chapters, and bill numbers*) (e.g., Penal Code Section 2045, Statutes 2004, Chapter 54 [AB 290]), regulations (include register number and effective date), and executive orders (include effective date) that impose the alleged mandate."[102]
- In Section 4, the test claim form contains a large box on the right-hand side in which the claimant is to identify the statute, regulation, and/or executive order which allegedly imposes a reimbursable state mandate.[103]
- In Section 4 of the test claim form, the claimant is required to check a box to indicate compliance with the adjacent text which reads, "*Copies of all statutes and executive orders cited are attached*."[104]

Consequently, a claimant filing a test claim is repeatedly placed on notice of the claimant's obligation to specifically identify the code section, including the statute, chapter, and bill number by which it was added or amended, which the claimant requests that the Commission review.

2. The Claimant Pled Only Statutes 2011, Chapter 680 (AB 646).

The claimant specifically pled only Statutes 2011, Chapter 680 (AB 646) in its Test Claim. The claimant did not plead any later statutory amendment to the Meyers-Milias-Brown Act, such as Statutes 2012, Chapter 314 (AB 1606). The claimant did not plead Public Employment Relations Board Regulation 32802 or any other regulation promulgated to implement, interpret, or make specific the Meyers-Milias-Brown Act.

Throughout the Test Claim, the claimant pled, quoted, or referred at least eleven times to Statutes 2011, Chapter 680 (AB 646):

- In Section 4 of the test claim form, inside the box titled Test Claim Statutes Or Executive Orders Cited, the claimant wrote, "Government Code sectopm [*sic*] 3505.4, 3505.5 and 3505.7, Statutes 2011, Chapter 680 (AB 646)."[105]
- The first sentence of the Test Claim reads: "On June 22, 2011, Assembly Bill 646 (Atkins) added duties to Collective Bargaining activities under Milias-Meyers-Brown Act (MMBA)."[106]
- Consistent with Statutes 2011, Chapter 680 (AB 646), the claimant described the test claim legislation as requiring factfinding only after mediation. "The bill authorized the employee organization, if the mediator is unable to effect settlement of the controversy

[102] See Exhibit A, Test Claim, page 1, emphasis added.

[103] See Exhibit A, Test Claim, page 1.

[104] See Exhibit A, Test Claim, page 1, emphasis in original.

[105] Exhibit A, Test Claim, page 1.

[106] Exhibit A, Test Claim, page 3.

within 30 days of his or her appointment, to request that the matter be submitted to a factfinding panel."[107]

- In its Written Narrative, the claimant quoted Government Code sections 3505.4, 3505.5 and 3505.7 as those sections existed after the enactment of Statutes 2011, chapter 680 (AB 646), but before the enactment of Statutes 2012, chapter 314 (AB 1606) or any other subsequent amendment.[108]
- When listing the new activities which the claimant alleges were imposed by the test claim legislation, the claimant introduced the list by stating, "If mediation did not result in settlement after 30 days and if the employee organization requests factfinding . . . ."[109] The reference to mediation as a pre-requisite to factfinding is consistent with Statutes 2011, Chapter 680 (AB 646) but is not consistent with later amendments to the Meyers-Milias-Brown Act.
- In noting the legislative history of the Meyers-Milias-Brown Act, the claimant stated, "There was no Mandatory Impasse Procedures requirement prior to 1975, nor in any of the intervening years, until the passage of Chapter 680, Statutes of 2011, filed on October 9, 2011."[110]
- With regard to a statewide cost estimate, the claimant quoted from an Assembly Floor Analysis of AB 646 which was dated September 1, 2011.[111]
- The Written Narrative portion of the Test Claim concluded, "The enactment of Chapter 680, Statutes of 2011 adding sections 3505.4, 3505.5 and 3505.7 imposed a new state mandated program . . . ."[112]
- In the Claim Requirements section of the Written Narrative, the claimant stated that it was complying with a Commission regulation by attaching only "Exhibit 1: Chapter 680, Statutes of 2011."[113]
- The first exhibit to the Test Claim was a copy of Statutes 2011, chapter 680 (AB 646) in slip law format.[114]
- The claimant attached to the Test Claim a copy of the Assembly Floor Analysis of AB 646 dated September 1, 2011.[115]

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[107] Exhibit A, Test Claim, page 3.

[108] Exhibit A, Test Claim, pages 4-7.

[109] Exhibit A, Test Claim, page 7.

[110] Exhibit A, Test Claim, page 8.

[111] Exhibit A, Test Claim, page 8.

[112] Exhibit A, Test Claim, page 11.

[113] Exhibit A, Test Claim, page 11.

[114] Exhibit A, Test Claim, page 15-18.

[115] Exhibit A, Test Claim, page 24-26.

In contrast to these eleven references to the 2011 statute, the Test Claim contains in the exhibits a computer printout from "leginfo.ca.gov" of the current version of Government Code section 3505.4, which contains language that was added by Statutes 2012, chapter 314. Neither in the leginfo printout nor anywhere else in the test claim filing is there a reference to Statutes 2012, chapter 314 or AB 1606, however.[116]

In light of the totality of the evidence, the Commission concludes that the claimant requested a ruling in this Test Claim on the question of whether Statutes 2011, chapter 680 (AB 646) — and only Statutes 2011, chapter 680 (AB 646) — imposed a reimbursable state mandate. The Test Claim's eleven references to Statutes 2011, chapter 680 — most of which are substantive references on the face of the test claim form or within the Written Narrative — outweigh the happenstance that one computer printout containing the current version of Government Code section 3505.4, as later amended, was appended as an exhibit.

The substantive portions of the Test Claim contain no references to or quotations from Statutes 2012, chapter 314 (AB 1606). The Test Claim contains no analysis of Statutes 2012, chapter 314 (AB 1606). The Test Claim contains no references to, quotations of, or analysis of PERB Regulation 32802 or any other regulation or executive order.[117]

The claimant also argues that the Commission should review Statutes 2012, chapter 314 (AB 1606) because AB 1606 states, in Section Two, that it is "intended to be technical and clarifying of existing law."[118]

Statements such as those contained in Section Two of AB 1606 — which purport to state what the Legislature meant when it passed a previous bill — are not binding upon judicial bodies or quasi-judicial bodies such as the Commission. A "subsequent legislative declaration as to the meaning of a preexisting statute is neither binding nor conclusive in construing the statute's application to past events. (Citation.) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration . . . ."[119]

On this record, the Commission concludes that the claimant invoked the Commission's jurisdiction to obtain an adjudication of whether Statutes 2011, chapter 680 (AB 646) imposed a reimbursable state mandate.[120] The Commission will now address this limited question.

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[116] Compare Exhibit A, Test Claim *passim*, with Exhibit A, Test Claim, pages 19-21 (the leginfo printout).

[117] The claimant repeatedly argues that the Commission should review Statutes 2012, chapter 314 (AB 1606) because the claimant first incurred costs after the effective date of Statutes 2012, chapter 314 (AB 1606). See Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 5, 7, 10, 11, 14. The claimant's assertion is not consistent with the test claim pleading requirements in Government Code sections 17521 and 17553.

[118] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 3-5.

[119] *Hunt v. Superior Court (Guimbellot)* (1999) 21 Cal. 4th 984, 1007-1008.

[120] The claimant did not request leave to amend its Test Claim to add Statutes 2012, chapter 314 (AB 1606). Government Code section 17557(e) and section 1183.1 of the Commission's regulations allow the claimant to amend a test claim at any time before the test claim is set for hearing, without affecting the original filing date, as long as the amendment substantially relates

B. Statutes 2011, Chapter 680 (AB 646) Does Not Impose a State-Mandated Program on Local Agencies.

In 2003, the California Supreme Court decided the *Kern High School District* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution.[121] In *Kern High School District*, school districts participated in various optional education-related programs that were funded by the state and federal government. Each of the underlying funded programs required school districts to establish and utilize school site councils and advisory committees. State open meeting laws later enacted in the mid-1990s required the school site councils and advisory bodies to post a notice and an agenda of their meetings. The school districts requested reimbursement for the notice and agenda costs pursuant to article XIII B, section 6.[122]

There, the *Kern* court reviewed and affirmed the holding of *City of Merced v. State of California*,[123] determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled. The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain — but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[124]

Thus, the California Supreme Court held as follows:

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have

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to the original test claim and is timely filed within the statute of limitations required by Government Code section 17551(c). This matter was set for hearing when the Draft Proposed Decision was issued on November 16, 2016. (Exhibit F.) Moreover, the statute of limitations to file a test claim on Statutes 2012, chapter 314 has long past whether based on being 12 months from the effective date of the statute or on 12 months from the date of first incurring costs.

[121] *Department of Finance v. Commission on State Mandates (Kern High School District)* (2003) 30 Cal.4th 727.

[122] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 730.

[123] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[124] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 743 (emphasis in original).

> participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.*[125]

More recently, the court in *POBRA* held that school districts that choose to employ peace officers and have a school police department are not mandated by the state to comply with the requirements of the Peace Officer Procedural Bill of Rights Act (POBRA).[126] Consistent with the prior decisions of the court, the court stated that "[t]he result of the cases discussed above is that, if a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[127]

1. <u>The Test Claim Statute, by Its Plain Language, Does Not Legally Compel Local Agencies to Engage in Mediation or Factfinding.</u>

In this case, the test claim statute does not legally compel local agencies to act. The plain language of the test claim statute links factfinding to mediation. Government Code section 3505.4 as replaced by the test claim statute reads in relevant part:

> If the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment, the employee organization may request that the parties' differences be submitted to a factfinding panel.[128]

This is the only sentence in the test claim statute which addresses how factfinding would commence.[129] The remainder of the test claim statute addresses the procedures for factfinding. Under the Meyers-Milias-Brown Act as it existed prior to the enactment of the test claim statute, mediation was voluntary, as supported by numerous judicial decisions.[130] The plain language of the statute indicated that mediation was voluntary. Government Code section 3505.2 read at that time (and still reads to this day):

> If after a reasonable period of time, representatives of the public agency and the recognized employee organization fail to reach agreement, the public agency and the recognized employee organization or recognized employee organizations together may agree upon the appointment of a mediator mutually agreeable to the

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[125] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, 731 (emphasis added).

[126] *Department of Finance v. Commission on State Mandates (POBRA)* (2009) 170 Cal.App.4th 1355, 1357.

[127] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366.

[128] Statutes 2011, chapter 680.

[129] The claimant does not identify any other language in the test claim statute which would trigger factfinding. See Exhibit G, Claimant's Comments on the Draft Proposed Decision.

[130] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034; *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21; *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

parties. Costs of mediation shall be divided one-half to the public agency and one-half to the recognized employee organization or recognized employee organizations.

The plain language of Section 3505.2 — the parties "may agree" to appoint a "mutually agreeable" mediator — means that mediation under the Meyers-Milias-Brown Act is voluntary.[131]

The courts have concluded that mediation under the Meyers-Milias-Brown Act is voluntary. "In the event of a failure to reach agreement after good faith efforts over a reasonable time to do so, the parties may agree to place the disputed matters in the hands of a mediator, but are not required to do so."[132] "[S]ection 3505.2 does not require mediation. Instead it allows the parties to agree on mediation and a mediator."[133] "We conclude, therefore, that there is a duty to 'meet and confer in good faith,' but there is no duty to agree to mediation."[134]

While other potential impasse procedures exist in the field of labor law (such as, for example, submission of the dispute to a form of binding arbitration named "interest arbitration" or to a factfinding panel), the Meyers-Milias-Brown Act (as it existed prior to the test claim statute) did not contain or require an impasse procedure other than voluntary mediation. Courts have stated: "Several California statutes applicable to different kinds of public employees contain mandatory procedures for identifying and resolving a bargaining impasse, usually requiring mediation. (Citations.) [¶] In contrast with those statutes, the applicable version of the MMBA did not mandate an impasse resolution procedure."[135] "Moreover, the Meyers-Milias-Brown Act provides for negotiation and permits the local agency and the employee organization to agree to mediation but not to fact-finding or binding arbitration."[136]

Consequently, the test claim statute allows for factfinding only "[i]f the mediator is unable to effect settlement." Since mediation remained voluntary after the effective date of the test claim statute, factfinding — which can be triggered by the union after an unsuccessful mediation — is a non-reimbursable downstream requirement of a discretionary decision by both parties to

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[131] "'Shall' is mandatory and 'may' is permissive." Government Code section 14. "Under 'well-settled principle[s] of statutory construction,' we 'ordinarily' construe the word 'may' as permissive and the word 'shall' as mandatory, 'particularly' when a single statute uses both terms." *Tarrant Bell Property, LLC v. Superior Court (Abaya)* (2011) 51 Cal.4th 538, 542.

[132] *Placentia Fire Fighters, Local 2147 v. City of Placentia* (1976) 57 Cal.App.3d 9, 21.

[133] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1034.

[134] *Alameda County Employees' Ass'n v. County of Alameda* (1973) 30 Cal.App.3d 518, 534.

[135] *Santa Clara County Correctional Peace Officers' Ass'n v. County of Santa Clara* (2014) 224 Cal.App.4th 1016, 1033-1034.

[136] *Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 25.

engage in mediation.[137]

Under state mandates law, the voluntary actions of a local agency do not create a reimbursable state mandate. "[T]he core point . . . is that activities undertaken at the option or discretion of a local government entity (that is, actions undertaken without any legal compulsion or threat of penalty for nonparticipation) do not trigger a state mandate and hence do not require reimbursement of funds — even if the local entity is obliged to incur costs as a result of its discretionary decision to participate in a particular program or practice."[138] "[I]f a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[139]

Mediation is voluntary under the plain meaning of the test claim statute, and under the test claim statute, fact finding can only be triggered after the mediation. Since the State is not obligated to reimburse a local agency for activities which are conducted voluntarily, the test claim statute does not impose a reimbursable state mandate.

Though, as discussed in the Background above, PERB came to a different legal conclusion regarding the test claim statute during the promulgation of PERB Regulation 32802 than the Commission does here, the plain language of the statute, the case law, and the legislative history of AB 646 strongly support the Commission's conclusion.

As discussed above, the plain language of the test claim statute conditions factfinding upon mediation, which is voluntary. The test claim statute does not contain any language which makes mediation or factfinding mandatory or which requires factfinding in the absence of mediation.

The claimant contends that the test claim statute's language is ambiguous.[140] The Commission disagrees. "Ordinarily, if the statutory language is clear and unambiguous, there is no need for judicial construction. A statute is regarded as ambiguous if it is capable of two constructions, both of which are reasonable."[141] The Commission finds the plain language of the test claim statute to be unambiguous and that the plain meaning therefore controls. "If the words themselves are not ambiguous, we presume the Legislature meant what it said, and the statute's

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[137] See *Department of Finance v. Commission on State Mandates (Kern High School District),* 30 Cal.4th 727, 743 and *San Diego Unified School Dist. v. Commission On State Mandates* (2004) 33 Cal.4th 859, 887.

[138] *Department of Finance v. Commission on State Mandates (Kern High School District),* 30 Cal.4th 727, 742.

[139] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

[140] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 9-14.

[141] *Snukal v. Flightways Manufacturing, Inc.* (2000) 23 Cal.4th 754, 778 [citations omitted].

plain meaning governs."[142] "[C]ourts should start . . . with the actual language of the statute, and if the text is clear as applied to a given case, and it does not fall into any of the exceptions, stop there. (Citation.) As Oliver Wendell Holmes said, 'we do not inquire what the legislature meant; we ask only what the statute means.'"[143]

The relevant language of the test claim statute is susceptible of only one meaning. At the time of the passage of the test claim statute (and currently), mediation under the Meyers-Milias-Brown Act was voluntary. The test claim statute allowed a union to request factfinding "[i]f the mediator is unable to effect settlement of the controversy within 30 days after his or her appointment," and the test claim statute contained no other provision triggering factfinding. There is therefore only one way to read the plain language of the statute. No ambiguity exists.

The Commission notes that, in the Claimant's Comments on the Draft Proposed Decision, the claimant does not identify a second, reasonable reading of the test claim statute which relies *only* upon the language of the test claim statute and the other then-extant provisions of the Meyers-Milias-Brown Act. The claimant's argument of ambiguity is based entirely upon extrinsic evidence, specifically, the legislative and amendment history of the test claim statute.

To the extent that the claimant attempts to identify an ambiguity by relying upon committee reports and other legislative history,[144] the claimant fails because unambiguous language in a statute trumps arguably inconsistent statements in legislative history. "When a statute is unambiguous, its language cannot be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process."[145] "Committee reports, often drafted by unelected staffers, cannot alter a statute's plain language."[146]

In a 1994 decision, the Fourth District Court of Appeal summarized some of the myriad problems with using legislative history to discern intent:

> [W]e must acknowledge that the criticisms of judicial use of legislative history are formidable indeed: The Constitution does not elevate the bits and pieces that make up any legislative history to the status of law — it reserves that honor only for the text of legislation that has run the gauntlet of the Legislature and the Governor's possible veto. The members of the Legislature have no opportunity to disapprove legislative history, and the Governor has no chance to veto it. Legislative history directly represents only the views of the few actors in the legislative process, including lobbyists and committee staff people, who are intimately involved with particular legislation. It is virtually impossible to accurately reconstruct exactly what went on when a legislative body passed a bill. Legislative history has become contaminated by documents which are more

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[142] *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 838.

[143] *J.A. Jones Construction Co. v. Superior Court (Dai-Ichi Bank Kangyo Bank, Ltd.)* (1994) 27 Cal.App.4th 1568, 1575 [quoting Holmes, Collected Legal Papers (1920) page 207].

[144] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 9-14.

[145] *Sabi v. Sterling* (2010) 183 Cal.App. 4th 916, 934.

[146] *People v. Johnson* (2015) 60 Cal. 4th 966, 992.

> aimed at influencing the judiciary after the bill is passed than explaining to the rest of the legislature what the bill is about before it is passed. Most basically, the idea that the diverse membership of a democratically elected legislature can ever have one collective "intent" on anything is a myth; if there is ambiguity it is because the legislature either could not agree on clearer language or because it made the deliberate choice to be ambiguous — in effect, the only "intent" is to pass the matter on to the courts.[147]

To the extent that the claimant contends that an ambiguity exists in the test claim statute when it is compared to its legislative history, the Commission rejects the argument.

The claimant also argues that the test claim statute contains a latent ambiguity.[148] The Commission is not persuaded. The Third District Court of Appeal has warned, "As we have recently cautioned, although extrinsic evidence may reveal a latent ambiguity in a statute, such ambiguity must reside in the statutory language itself. It cannot exist in the abstract, or by ignoring the statutory language."[149]

No ambiguity exists within the language of the test claim statute. The claimant's alleged latent ambiguity exists only if a person ignores the test claim statute's plain language or reads the statute to include language which is not there.

While legislative history need not be reviewed when a statute's plain language is unambiguous, if the relevant legislative history were to be reviewed in this Test Claim, then the legislative history would be found to be consistent with the plain language of the statute. The Legislature specifically chose to omit mandatory mediation from the test claim statute, as is reflected in the Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3 and in the March 23, 2011 amendments themselves.[150] With regard to courts or quasi-judicial tribunals, such as the Commission, their rulings may not create or add text which was omitted by the Legislature. In the words of the California Supreme Court:

> [I]n construing this, or any statute, we may not broaden or narrow the scope of the provision by reading into it language that does not appear in it or reading out of it language that does. "Our office ... 'is simply to ascertain and declare' what is in

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[147] *J.A. Jones Construction Co. v. Superior Court (Dai-Ichi Bank Kangyo Bank, Ltd.)* (1994) 27 Cal.App.4th 1568, 1577 [footnotes omitted]. See also Katzman, Judging Statutes (2014) pages 40-41 [noting the criticism that legislative history fails to meet the constitutional requirements of bicameralism (passage by both houses) and presentation (providing a copy to the executive for signature or veto)].

[148] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 11-12.

[149] *Siskiyou County Farm Bureau v. Department of Fish and Wildlife* (2015) 237 Cal.App.4th 411, 420.

[150] See Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, 2011, page 3) (wherein the author agrees to and takes amendments to "remove all of the provisions related to mediation").

> the relevant statutes, 'not to insert what has been omitted, or to omit what has been inserted.' " (Citation.) "'[A] court . . . may not rewrite the statute to conform to an assumed intention which does not appear from its language.'" (Citation.)[151]

Therefore, since the Legislature excluded language making factfinding or mediation mandatory, it is not within the authority of this Commission to re-write the test claim statute and insert new provisions.

PERB supported its reading of the test claim statute by stating that it was harmonizing the test claim statute with the rest of the Meyers-Milias-Brown Act.[152] However, even when the test claim statute is read in conjunction with the rest of the Act, nothing in the text passed by the Legislature (in 2011 or before) makes factfinding or mediation mandatory. The process of harmonization cannot be used to add terms which the Legislature has not enacted; phrased differently, a person construing an amended statute must seek to harmonize all of the provisions which have been enacted but cannot add new provisions which have not been enacted.

Nor is the Commission persuaded by the arguments of the claimant and of PERB that, since factfinding is referenced in the statutory section as amended by the test claim statute which authorizes an employer to implement its last, best, and final offer, factfinding is therefore mandatory.[153] As amended by the test claim statute, Government Code section 3505.7 authorizes the employer to implement its last, best, and final offer "[a]fter any applicable mediation and factfinding procedures have been exhausted." The use of the term "applicable" means only that; if a procedure is applicable, it must be exhausted, and, if a procedure is not applicable, it need not be exhausted. Government Code section 3505.7 is not the statutory provision which determines whether or not a procedure is applicable; other provisions of the Act do that. Since Government Code section 3505.4 as amended by the test claim statute linked factfinding to mediation, and since mediation under the Act is indisputably voluntary, then factfinding under the test claim statute is voluntary and is not legally compelled by the State. Nothing in Section 3505.7 changes the voluntary nature of mediation under the Act. Government Code section 3505.7 refers to "any applicable mediation and factfinding procedures." Under the claimant's and PERB's reasoning, mediation would also be required (or one of either mediation or factfinding would be required) before an employer could implement its last, best, and final offer. Yet, the legal authorities (cited and quoted above) are unanimous in holding that mediation under the Act is voluntary. Nothing in the claimant's or PERB's analysis explains how the phrase "any applicable mediation and factfinding procedures" can be construed to mean that mediation is voluntary while factfinding is mandatory. The determination of

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[151] *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545.

[152] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 124 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 1).

[153] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, pages 124-125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, pages 1-2).

whether or not mediation or factfinding is voluntary must be determined by reference to other provisions of the Act, not to Section 3505.7.

PERB based its reading in part on the fact that a staffer from the author's legislative office stated in December 2011 (after the test claim statute had been enacted) that mandatory factfinding in all situations was consistent with the legislative intent.[154] Post-enactment statements of intent by legislators and their staff are of little or no legal weight. "The views of an individual legislator or staffer concerning the interpretation of legislation may not properly be considered part of a statute's legislative history, particularly when the views are offered after the statute has already been enacted."[155]

As discussed above, the Committee Reports in fact reveal that the Legislature was well aware of the omission of the mandatory mediation provisions, although that was not the author's original intent in introducing the bill. As the Assembly Committee on Public Employees, Retirement and Social Security memorialized, the amendments taken by the author:

> 1) *Remove all of the provisions related to mediation*, making no changes to existing law.
>
> 2) *Remove the requirements that an employer and employee organization submit their differences to a fact-finding panel* and instead provides employees organizations with the *option* to participate in the fact-finding process established in Government Section 3505.4 which is added by this measure.
>
> 3) Clarify the existing requirement for a public employer to conduct a public impasse hearing prior to imposing its last, best, and final offer.[156]

PERB based its reading in part on the fact that the "majority of interested parties, both employers and labor representatives, also urged a reading of AB 646 that provides for a factfinding request whether mediation occurs or not."[157] The opinions of third parties on what the law ought to be cannot alter the plain language of the test claim statute or express the intent of the Legislature as a whole.

The claimant argues that, even if the language of the test claim statute is unambiguous, then the Commission's reading is still erroneous because it yields an absurd result.[158] The "absurd result" rule is well-established. "If the [statutory] language is clear, courts must generally follow its

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[154] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

[155] *California Highway Patrol v. Superior Court (Allende)* (2006) 135 Cal.App.4th 488, 501.

[156] Exhibit G, Claimant's Comments on the Draft Proposed Decision, page 21 (Assembly Committee on Public Employees, Retirement and Social Security, Analysis of AB 646 as amended March 23, page 3).

[157] Exhibit E, Public Employment Relations Board's Response to the Request for the Rulemaking Files, page 125 (Letter from Les Chisholm, PERB, to Peggy J. Gibson, Office of Administrative Law, dated December 28, 2011, page 2).

[158] Exhibit G, Claimant's Comments on the Draft Proposed Decision, pages 14-15.

plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend."[159] "'Absurd' means when a statute is obviously not construed in a reasonable and commonsense manner."[160] "We must exercise caution using the 'absurd result' rule; otherwise, the judiciary risks acting as a 'super-Legislature' by rewriting statutes to find an unexpressed legislative intent."[161]

The Commission finds nothing absurd in the plain language of the test claim statute. Prior to the enactment of the test claim statute, the Meyers-Milias-Brown Act contained no provision regarding factfinding. After the enactment of the test claim statute, the Act required factfinding downstream of voluntary mediation. The test claim statute increased the bargaining options available to local government employees under certain circumstances. Although the test claim statute as passed may not have been the ideal envisioned by the bill's sponsor, it was consistent with the sponsor's intent in that (1) factfinding became a part of the Act, and (2) in certain downstream circumstances, an employee organization could require a local government to engage in factfinding.[162] There is nothing absurd in this result.

The Commission finds that Statutes 2011, chapter 680 does not legally compel local agencies to comply with the factfinding provisions of the test claim statute.

2. The Test Claim Statute's Requirement of a Public Hearing Before the Implementation of a Last, Best, and Final Offer Does Not Legally Compel Local Agencies to Hold a Public Hearing.

The test claim statute can arguably be read to state that, if a local government employer seeks to implement its last, best, and final offer, the local government employer is mandated to first hold a public hearing — even if the local government employer opted out of mediation and factfinding. Compare former Government Code section 3505.4 ("a public agency that is not required to proceed to interest arbitration may implement its last, best, and final offer") with the test claim statute's Government Code section 3505.7 ("a public agency that is not required to proceed to interest arbitration may, *after holding a public hearing regarding the impasse*, implement its last, best, and final offer") (new language emphasized).

While the test claim statute appears to create the new requirement of a public hearing regarding an impasse, the local government employer would only be obligated to hold the public hearing if the local government employer decided to impose its last, best, and final offer — and the imposition of the last, best, and final offer is a discretionary activity. In *Operating Engineers Local 3 v. City of Clovis*, PERB held that "[p]ursuant to MMBA section 3505.4, once an impasse has been properly reached between the parties, a public agency 'may implement its last, best, and

[159] *Metcalf v. County of San Joaquin* (2008) 42 Cal.4th 1121, 1131.

[160] *People v. Kainoki* (1992) 7 Cal.App.4th Supp.8, 17.

[161] *California School Employees Ass'n v. Governing Board of South Orange County Community College District* (2004) 124 Cal.App.4th 574, 588.

[162] The unambiguous meaning of a statute cannot be altered or ignored merely because the law's sponsor did not understand the ramifications of her bill. "The [absurdity] doctrine does not include substantive errors arising from a drafter's failure to appreciate the effect of certain provisions." Scalia & Garner, Reading Law: The Interpretation of Legal Texts (2012) page 238.

final offer.' This provision is permissive, not mandatory. Therefore, while the parties are properly at impasse, the City is not obligated to implement its last, best, and final offer." [163] Under state mandates law, the voluntary actions of a local agency do not create a reimbursable state mandate. "[I]f a local government participates 'voluntarily,' i.e., without legal compulsion or compulsion as a practical matter, in a program with a rule requiring increased costs, there is no requirement of state reimbursement."[164]

The discretionary nature of the imposition of the last, best, and final offer renders the pre-requisite of a public hearing to be discretionary as well; the public hearing, therefore, is not a reimbursable state mandate.

3. There Is No Evidence in the Record That Local Agencies Are Practically Compelled to Engage in Mediation or Factfinding or to Hold a Public Hearing.

The court in *Kern High School District* left open the possibility that a state mandate might be found in circumstances of practical compulsion, where a local entity faced certain and severe penalties as a result of noncompliance with a program that is not legally compelled. The court in *POBRA* explained further that a finding of "practical compulsion" requires a concrete showing in the record that a failure to engage in the activity in question will result in certain and severe penalties and that as a practical matter, local agencies do not have a genuine choice of alternative measures.[165]

The claimant has not submitted any evidence that the claimant was under a practical compulsion to engage in factfinding. There is no evidence in the record that, for example, the claimant would have automatically suffered draconian consequences if it refused to engage in factfinding. Rather, the record reveals that the claimant engaged in voluntary factfinding in or around August 2015 or perhaps mandatory factfinding under a later enacted statute or regulation that is not before the Commission, apparently under the mistaken belief that the test claim statute mandated factfinding.[166]

If a local agency government employer like the claimant and one of its unions reached an impasse, all that the test claim statute required was that the local agency employer engage in factfinding if, as a pre-requisite, the local agency employer previously agreed to voluntary mediation — which the local agency employer was under no obligation to do. Under the test

[163] Exhibit H, page 72 (*Operating Engineers Local 3 v. City of Clovis*, PERB Case No. SA-CE-513-M, page 5, footnote 5).

[164] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1365-1366 ("POBRA").

[165] *Department of Finance v. Commission on State Mandates* (2009) 170 Cal.App.4th 1355, 1367 ("POBRA").

[166] Exhibit D, Claimant's Rebuttal Comments, pages 11-16 (Fact-finding Report & Recommendations, City of Glendora and Glendora Municipal Employees Association, dated August 24, 2015, pages 1-6).

claim statute, a local agency employer who has reached impasse was free to decline mediation (and thus factfinding) and to implement its last, best, and final offer.[167]

In addition, the claimant has not submitted evidence that it is practically compelled to implement a last, best, and final offer which would then trigger the requirement under the test claim statute to hold a public hearing.

V. Conclusion

Based on the foregoing analysis, the Commission finds that Statutes 2011, chapter 680, does not impose a reimbursable state-mandated program.

[167] Government Code section 3505.7, as added by Statutes 2011, chapter 680, section 4.

DECLARATION OF SERVICE BY EMAIL

I, the undersigned, declare as follows:

I am a resident of the County of Sacramento and I am over the age of 18 years, and not a party to the within action. My place of employment is 980 Ninth Street, Suite 300, Sacramento, California 95814.

On January 11, 2017, I served the:

Proposed Decision
Local Agency Employee Organizations: Impasse Procedures, 15-TC-01
Government Code Sections 3505.4, 3505.5, and 3505.7;
Statutes 2011, Chapter 680 (AB 646)
City of Glendora, Claimant

by making it available on the Commission's website and providing notice of how to locate it to the email addresses provided on the attached mailing list.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on January 11, 2017 at Sacramento, California.

Jill L. Magee
Commission on State Mandates
980 Ninth Street, Suite 300
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COMMISSION ON STATE MANDATES

Mailing List

Last Updated: 11/22/16

Claim Number: 15-TC-01

Matter: Local Agency Employee Organizations: Impasse Procedures

Claimant: City of Glendora

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